

REQUEST FOR CONFIDENTIAL TREATMENT

GRAY, CARY, AMES & FRYE

NOT FOR PUBLIC INSPECTION

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DEC 28 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

November 12, 1992

VIA FACSIMILE

597 9055

FAKED
11-12-92

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CONFIDENTIAL - ATTORNEY/CLIENT
PRIVILEGED DOCUMENT

Thomas Ortolf
Titan Satellite Systems
3033 Science Park Road
San Diego, CA 92121

PP Docket No. 92-234
Confidential attachment to Comments of
Titan Satellite Systems Corporation, filed
Dec. 28, 1992.

Re: Interpretation of Software Maintenance Agreement

Dear Tom:

As you requested, we have reviewed a representative software maintenance and licensing agreement between General Instruments ("GI") and its customers to determine if the customer's use of Titan's 56 bit random code would violate any provision of the agreement. It is our conclusion, as developed in further detail below, that the agreement does not forbid the customer to use Titan's codes in conjunction with the GI software. Furthermore, such a use would not provide GI with a valid basis to terminate the customer's agreement.

By way of background, we understand that Titan has proposed to certain GI customers that their programmers insert unit keys supplied by Titan into the CATV unit keylists used in the operation of GI's scrambling system software. In this regard, the use proposed by Titan does not constitute a modification of the software, only the use of the software with non-GI codes. We understand that the software supplied by GI originated with a Titan subsidiary, but for the purposes of this analysis only we have presumed that GI might have some valid proprietary rights in the software it supplies to customers.

You have provided us with the following documents, upon which we based our analysis:

1. Nine page unsigned document entitled "VideoCipher Scrambling System Software Maintenance Agreement No. C87V-SWE-_____" which appears to bear the date 4/2/87;

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No. of Copies rec'd
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2. Three page unsigned document entitled "Schedule G Seller's Software License Agreement" which appears to bear the identifying number C86V-USS-_____" and the date 20 August 1986;
3. Two page incomplete, unsigned document entitled "Schedule D Software License Agreement" which bears no date or identifying number;
4. One page untitled, unsigned document which bears no date or identifying number, which purports to confirm the restricted access provisions regarding the VideoCipher system; and
5. Three page Titan document entitled "Uplink Appendable Unit Keylist Generation" which bears the identifying number TSS-92-132E-X and the date 4 November 1992.

As we have discussed, we recognize that the documents presently available may not constitute that complete agreement between GI and its customers. We have reviewed this material in order to determine the risk that the customer's use of Titan's 56 bit random code would violate any provision of the software licensing and maintenance agreement, or provide GI with a valid basis to terminate the customer's maintenance agreement.

The software "Maintenance Agreement" (document 1 above) provides in paragraph 2 that the agreement does not constitute a license to use the underlying software, and that such provisions are contained in a document entitled the "Scrambling Agreement." You have informed me that documents 2 and 3 above constitute versions of the relevant provisions from the Scrambling Agreement, and that the remainder of the Scrambling Agreement does not contain any significant limitations or restrictions on the use of the software. The remainder of the Maintenance Agreement specifies the terms under which GI will perform software maintenance and upgrades. The only provisions which appear relevant to the present analysis are those which specify that if the customer has unauthorized modifications performed on the software, GI can charge for the services performed to correct errors (paragraph 6) or can refuse to perform such services entirely (last sentence in paragraph 3). Implicit in these provisions appears to be the understanding that customers may, from time to time, modify the software albeit at their own risk.

The Maintenance Agreement further provides that the agreement may be terminated by GI upon breach by the customer, but no other provision of the agreement appears to restrict the customer's right to use Titan-supplied unit keys in the operation of the software system.

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With respect to the software "Licensing Agreement," documents 2 and 3 above appear to be substantially identical, except that document 3 specifies the parties to the agreement with particularity. In general, the Licensing Agreement permits the use of the software and specifies the restrictions imposed. These restrictions are:

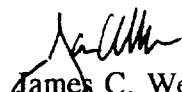
1. The software may only be used on the computer provided, or a backup computer in the event of a malfunction.
2. The licensee may use the software only in conjunction with its internal operations, and shall not supply the use of the software to others.
3. The license may not disclose the software to others.

The only provision in the Licensing Agreement which appears relevant to Titan's proposal is the restriction on use by others (section 2 above), in that GI might attempt to argue that the use of Titan's unit key code constituted a use by another. However, this appears to be a strained construction of the restriction, and one which could face challenge to its blatant anti-competitive effects.

The Licensing Agreement further provides that the agreement may be terminated by GI upon breach, upon termination of use by the customer, or failure to pay fees, but no other provision of the agreement appears to restrict the customer's right to use Titan-supplied unit keys in the operation of the software system.

Thus, it is our conclusion that the agreement does not forbid the customer to use Titan's codes in conjunction with the GI software. Furthermore, such a use does not appear to provide GI with a valid basis to terminate the customer's maintenance agreement. However, we recognize that some portion of the complete customer agreement may contain other or further restrictions. Therefore, effort should be made to obtain a complete copy of an actual agreement for analysis. If you have any questions about our analysis or conclusions, please feel free to contact me or Ed McIntyre.

Very truly yours,


James C. Weseman
For

GRAY, CARY, AMES & FRYE

JCW:lm

cc: D. Marshall Nelson